United States Court of Appeals

for the Second Circuit

APPENDIX

M1a

75-6038

B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MABEL M. CASE,
d/b/a/ CASE NURSING HOME,

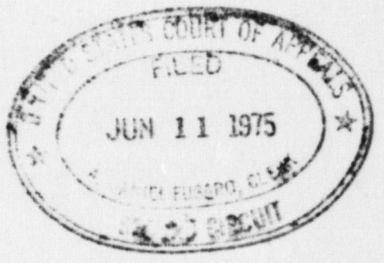
Plaintiff,
Appellant,

-vs.-

CASPAR WEINBERGER, as Secretary of the United States Department of Health, Education & Welfare; BERNICE L. BERNSTEIN, as Regional Director for Region II of the United States Department of Health, Education & Welfare; ALAN J. SAPERSTEIN, Director, Office of Long Term Care, Region II, HEW; ABE LAVINE, Commissioner of the New York State Department of Social Services; and JOHN LASCARIS, Commissioner of the Onondaga County Department of Social Services,

Defendants,
Appellees

SECOND CIRCUIT
DOCKET NO. 75-6038



APPENDIX -- VOLUME I

MICHAEL A. WINEBURG & JOSEPH C. SCOLLAN OF COUNSEL

MICHAELS, MICHAELS & WINEBURG
ATTORNEYS AND COUNSELLORS AT LAW
410 METCALF PLAZA
P. O. BOX A
AUBURN, NEW YORK 13021

3

PAGINATION AS IN ORIGINAL COPY

APPENDIX - TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MABEL M. CASE, d/b/a CASE NURSING HOME, and LOUISE UNGARO, d/b/a PHILLIPS NURSING HOME, Plaintiffs, -against- CASPAR WEINBERGER, as Secretary of the United States Department of Health Education & Welfare; BERNICE L. BERNSTEIN, as Regional Director for Region II of the United States Department of Health, Education & Welfare; ALAN J. SAPERSTEIN, Director, Office of Long Term Care, Region II, HEW; ABE LAVINE, Commissioner of the New York State Department of Social Services; and JOHN LASCARIS, Commissioner of the Onondaga County Department of Social Services, Defendants.	COMPLAINT 75-CV-

Mabel M. Case, and Louise Ungaro, by their attorneys, Michaels, Michaels & Wineburg, respectfully allege upon information and belief and complain as follows:

1. This action arises under the Fifth and Fourteenth Amendments to the Constitution of the United States, subchapters XVIII and XIX of Chapter 7 of the Social Security Act (42 U.S.C. § 1395 et seq. and 1396 et seq.), as hereinafter more fully appears The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00), for each plaintiff.

2. In addition to 28 U.S.C. § 1331, this action is brought pursuant to the review provisions of Chapter 7 of the Social Security Act (42 U.S.C. § 405, 42 U.S.C. § 1395 ff(c)), pursuant to the provisions of the Administrative Procedure Act (5 U.S.C. § 701 et seq.), pursuant to the provisions of the Declaratory Judgment Act (28 U.S.C. § 2201), and pursuant to the provisions regarding Courts of Three Judges (28 U.S.C. § 2282, 2284).

3. Plaintiff, Mabel M. Case, is the owner and operator of the Case Nursing Home, a skilled nursing facility located at 119 Kirk Avenue, Syracuse, New York.

4. Plaintiff, Louise Ungaro, is the owner and operator of the Phillips Nursing Home, a skilled nursing facility located at 714 West Onondaga Avenue, Syracuse, New York.

5. Defendant, Caspar Weinberger is the Secretary of the United States Department of Health, Education & Welfare (HEW), maintains his office in the City of Washington, D. C., and is responsible for all actions, operations, and determinations of HEW.

6. Defendant, Bernice L. Bernstein is the Regional Director for Region II of HEW, maintains her principal office in the City of New York, New York, and is responsible for the administration of HEW's programs in Region II which includes the entire State of New York.

7. Defendant, Alan J. Saperstein is the Director, Office of Long Term Care, Region II, HEW, and is responsible for

the administration of HEW's programs in Region II regarding skilled nursing facilities.

8. Defendant, Abe Lavine is a Commissioner of the New York State Department of Social Services, maintains his principal office in Albany, New York, and is responsible for the operation of the State of New York's participation in the Social Security Medicaid Program, including certification of skilled nursing homes to HEW for participation in the program, and placement of Medicaid patients in such homes.

9. Defendant, John Lascaris is the Commissioner of the Onondaga County Department of Social Services, maintains his principal office in the City of Syracuse, New York, and is responsible for the operation of the Medicaid Program and the placement of Medicaid patients in skilled nursing facilities in Onondaga County.

10. Both plaintiffs, as operators of their respective nursing homes, have for many years been providers of services as skilled nursing facilities in the Medicaid Program and have received State and Federal reimbursement pursuant thereto.

11. Both plaintiffs have always and do now serve principally Medicaid patients, and if denied participation in the Medicaid Program, will be forced to close; 21 of the 26 patients in the Phillips Nursing Home, and 18 of 21 patients in the Case Nursing Home are Medicaid patients.

12. Pursuant to 42 U.S.C. § 1396a(a)(28), a subchapter XIX or Medicaid skilled nursing facility must satisfy all the

requirements of a subchapter XVIII or Medicare skilled nursing facility, as set forth in 42 U.S.C. § 1395x(j).

13. 42 U.S.C. § 1395x(j)(13) requires that a skilled nursing facility meet the Life Safety Code of the National Fire Protection Association as applicable to nursing homes, but provides that the Secretary may waive provisions of such code which, if rigidly applied, would result in unreasonable hardship upon a nursing home, if the granting of such waivers will not adversely affect the health and safety of the patients.

14. On March 25, 1975, either the HEW Region II Office of the Regional Director, or the Office of Long Term Care, determined and advised that plaintiff, Mabel M. Case's Case Nursing Home did not meet the provisions of the Life Safety Code, that no waivers would be granted, and that New York State authorities were requested to take appropriate action.

15. The New York State Department of Social Services, by letter dated March 25, 1975 to the Case Nursing Home, but not postmarked until April 8, 1975, and not received until on or about April 11, 1975, notified Case Nursing Home that effective April 12, 1975, it was no longer certified as a provider of skilled nursing facility services for Medicaid patients; and that prior to May 12, 1975, it would be contacted by the Onondaga County Department of Social Services to arrange for the transfer of Medicaid patients.

16. Regarding the Phillips Nursing Home, and plaintiff, Louise Ungaro, either the HEW Region II Office of the Regional Director, or the Office of Long Term Care, determined and advised

Phillips Nursing Home that it did not meet the provisions of the Life Safety Code, that no waivers would be granted, and that State authorities were being requested to take appropriate action.

17. Upon information and belief, on or about April 8, 1975, the State of New York Department of Social Services acted to decertify the Case Nursing Home, and ordered the removal of Medicaid patients therefrom, although it has not yet notified Phillips Nursing Home of the same.

18. Prior to July 1, 1973, the New York State Department of Social Services had the authority to grant Life Safety Code waivers for Medicaid nursing homes (42 U.S.C. § 1396a(a)(28)(F)(i)).

19. In 1971, both plaintiffs and numerous other nursing homes were advised by the New York State Department of Social Services that their participation in the Medicaid Program was being terminated for Life Safety Code violations, and said department refused to provide hearings regarding said terminations.

20. Federal litigation subsequently resulted in rulings that facilities could not be terminated from participation in the Medicaid Program without first being afforded an adversary hearing to determine their eligibility for waivers, nor, in effect, during judicial review of the decisions rendered as a result of said hearings.

21. Plaintiff, Mabel Case was first granted a hearing without a hearing officer, appealed, then withdrew the appeal when the New York State Attorney General's office relented and

agreed that she was entitled to a proper hearing; she then participated in a new hearing before a hearing officer, but no decision has yet been rendered.

22. The Phillips Nursing Home was granted a hearing, brought an Article 78 proceeding, and appealed, and the Appellate Division remanded, ordering that the home be given an opportunity to present evidence of correction of deficiencies, and entitlement to waiver.

23. On July 1, 1973, the Social Security Act was amended to give the Secretary of HEW the authority to grant Life Safety Code waivers, rather than state authorities. Public Law 92-603, § 246; 42 U.S.C. 1396a(a)(28), and 42 U.S.C. § 1395x(j)(13)).

24. Thereafter, Phillips Nursing Home litigation was dismissed, on motion of the Attorney General, as moot, the state taking the position that since it no longer had the authority to grant waivers, it should no longer be obligated to give hearings regarding granting of waivers.

25. In October, 1974, both plaintiffs were advised regarding their respective nursing homes by HEW Region II officials, that it had the authority to grant waivers, that the Long Term Care Office had made a recommendation that the respective facilities had Life Safety Code violations, were not entitled to waivers, and that the respective facilities might request a review of their recommendation before the program director, Office of Long Term Care, within seven days.

26. In December, 1974, both plaintiffs attended such a review in New York City, with counsel, but such review consisted

only of informal discussions with some Region II attorneys and staff members; the review was conducted by the assistant to the director, Office of Long Term Care; it did not provide the plaintiffs an opportunity to present sworn testimony by Fire Safety Code expert witnesses which they had brought to the meeting nor to confront or cross-examine the witnesses against them, nor to determine what evidence or what standards were being relied upon regarding their respective denial of waivers; the understanding of the plaintiffs, as a result of these review proceedings, was that they were to informally present correction plans, which they could subsequently further discuss with Region II authorities in a "give and take" atmosphere.

27. Subsequently, in March and April, as hereinabove alleged, without further discussion or warning, they were notified that requests for waivers were denied, and that Medicaid patients would be removed; it appears that one of HEW's grounds is that no wood frame nursing home is entitled to a waiver, which ground is legally erroneous.

28. The defendants have refused to grant any type of hearing other than the above alleged informal meeting, on the grounds that hearing rights are only available to Medicare providers, and not Medicaid providers.

FOR A FIRST CAUSE OF ACTION AGAINST
THE DEFENDANTS

29. The plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 28.

30. Defendants have violated the rights of the plaintiff under the Fifth and Fourteenth amendments to the Constitution of the United States, in that they are depriving the plaintiffs of property in taking away their income from Medicaid patients and forcing the plaintiffs to close their respective nursing homes, and are depriving the plaintiffs of liberty by attaching to the plaintiffs the stigma and the ill reputation of operating nursing homes unsafe and unhealthy in regard to fire, all without due process of law in that defendants failed and refused to afford the plaintiffs adequate notice and opportunity for a hearing, and more particularly:

(a) Timely written notice of its determination to deny waivers;

(b) Disclosure to the respective plaintiffs of the evidence against them regarding denial of their requests for waivers;

(c) An opportunity for plaintiffs to present sworn testimony, particularly expert testimony as to life and fire safety;

(d) An opportunity to confront and cross-examine adverse witnesses;

(e) A hearing body which is neutral and detached and that does not include persons responsible for investigations of nursing homes or persons who assert charges based on such investigations;

(f) A written statement as to the evidence relied upon in denying waivers and the reasons for said action.

(g) Any adequate opportunity for reconsideration, redetermination, or review whatever.

FOR A SECOND CAUSE OF ACTION AGAINST THE DEFENDANTS

31. The plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 30.

32. Defendants have violated the rights of the plaintiffs under the Fifth and Fourteenth amendments to the Constitution of the United States, in that the defendants have invidiously discriminated against and denied equal protection of the laws to the class of skilled nursing facilities participating in the Medicaid program, of which class both the plaintiffs are members.

33. Medicare providers are entitled to hearings and judicial review when dissatisfied with any determination by the Secretary that they do not comply with the conditions of participation (42 U.S.C. § 1395ff(c)).

34. Under various provisions of Federal and State law, and regulations thereunder, Medicaid providers are entitled to state hearings regarding claimed violations of conditions of participation.

35. Skilled nursing facilities participating in Medicaid are required to fulfill the conditions of participation of Medicare providers.

36. The only class not given hearing and judicial review rights by either the Federal or State authorities under the Social Security Act are skilled nursing facilities participating in Medicaid in regard to Life Safety Code violations and waivers.

37. This classification is completely devoid of any rational basis.

FOR A THIRD CAUSE OF ACTION ACAINST THE DEFENDANTS

38. The plaintiffs repeat and reallege paragraphs 1 through 37.

39. In the alternative to the first and second causes of action, defendants are violating the Social Security Act in that said Act does grant to the plaintiffs the right to hearings and judicial review.

40. In order for a skilled nursing facility to qualify as a provider of services under subchapter XIX (Medicaid), it must qualify as a provider of services under subchapter XVIII (Medicare);

41. The authority of the Secretary to determine and/or waive Life Safety Code violations is provided under subchapter XVIII, not subchapter XIX.

42. Subchapter XVIII provides that any institution dissatisfied with any determination by the Secretary that it is not a provider of services is entitled to a hearing thereon by the Secretary after reasonable notice and opportunity for hearing, and to judicial review, to the same extent as is provided in 42 U.S.C. § 405.

43. Plaintiffs operate institutions dissatisfied with determinations by the Secretary made under subchapter XVIII that they are not providers of services, and are entitled to hearings and judicial review.

FOR A FOURTH CAUSE OF ACTION AGAINST THE DEFENDANTS

44. Plaintiffs repeat the allegations contained in paragraphs 1 through 43.

45. In the alternative, plaintiffs are entitled to review of the defendants' actions pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

46. The actions of the defendants are unlawful and must be set aside in that:

(a) They are arbitrary, capricious, and an abuse of discretion, and otherwise not in accordance with law;

(b) They are contrary to the constitutional rights, powers, privileges and immunities of the plaintiffs;

(c) They are in excess of the defendants' statutory authority and limitations, and short of the plaintiffs' statutory rights;

(d) They were taken without observance of the procedures required by law;

(e) They are not supported by substantial evidence.

47. By reason of the hereinabove alleged agency actions, plaintiffs have suffered legal wrong and have been adversely affected and aggrieved.

48. The agency actions are final, not precluded from judicial review by statute, nor committed by law to agency discretion.

WHEREFORE, the plaintiffs demand judgment against the defendants as follows:

(A) Declaring that the actions of the defendants are null and void and without effect, in that:

(1) They deprived the plaintiffs of due process of law.

(2) They violated the Social Security Act.

(3) They were unlawful and must be set aside pursuant to the provisions of the Administrative Procedure Act.

(B) That the defendants be permanently restrained and enjoined from denying waivers of Life Safety Code violations and from causing decertification of the nursing homes of the plaintiffs from participation in the Medicaid Program and from preventing placement of or causing the removal of Medicaid patients therefrom and from causing the cessation of Medicaid reimbursement, without first providing plaintiffs the opportunity, upon reasonable notice, of full and adversary administrative hearings, with administrative and judicial review thereof.

(C) Grant plaintiffs such other and further relief as to the Court shall appear just, equitable, or appropriate.

(D) Award plaintiffs the costs and disbursements of this action.

Yours, etc.

MICHAELS, MICHAELS & WINEBURG

By: _____
Michael A. Wineburg, Esq.
Attorneys for the Plaintiffs
Office and Post Office Address
410 Metcalf Plaza, P.O. Box A
Auburn, New York 13021
Tel.: (315) 253-4444

A 13

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MABEL M. CASE,
d/b/a CASE NURSING HOME,
And LOUISE UNGARO,
d/b/a PHILLIPS NURSING HOME,

Plaintiffs

-against-

CASPAR WEINBERGER, as Secretary of the United States Department of Health, Education & Welfare; BERNICE L. BERNSTEIN, as Regional Director for Region II of the United States Department of Health, Education and Welfare; ALAN J. SAPERSTEIN, Director, Office of Long Term Care, Region II, HEW; ABE LAVINE, Commissioner of the New York State Department of Social Services; and JOHN LASCARIS, Commissioner of the Onondaga County Department of Social Services,

Defendants

CIVIL NO. 75-CV-184

ANSWER

Defendant, UNITED STATES OF AMERICA, acting through Caspar Weinberger, as Secretary of the United States Department of Health, Education and Welfare, and Bernice L. Bernstein, as Regional Director for Region II of the United States Department of Health, Education and Welfare, Alan J. Saperstein, Director, Office of Long Term Care, Region II, HEW, by James M. Sullivan, Jr., United States Attorney, in and for the Northern District of New York, James E. Cullum, of Counsel, for its answer to the plaintiffs' Complaint, states as follows:

1. ADMITS the allegations contained in paragraphs 3, 4, 5, 6, 8, 12, 13, 14, 16, 19, 23, and 25.

A14

2. DENIES the allegations contained in paragraphs 2, 7, and 28.

3. DENIES knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 1, 9, 11, 15, 17, 21, 22, and 24.

4. DENIES the allegations contained in paragraph 10, except to the extent that the respective nursing homes received reimbursement from the State of New York.

5. DENIES knowledge or information sufficient to form a belief as to the allegations contained in paragraph 18, except to the extent that the authority to grant life safety code waivers for medicaid nursing homes was vested in the State of New Yo

6. DENIES the allegations contained in paragraph 20, except to the extent that the rulings and opinions of the Federal Courts in litigation referred to therein speak for themselves.

7. DENIES the allegations contained in paragraph 26, except to the extent that the review was conducted by the assista to the Director, Office of Long Term Care.

8. DENIES the allegations contained in paragraph 27, except to the extent that waivers were denied.

FOR A FIRST CAUSE OF ACTION

9. REPEATS AND REALLEGES each and all of the allegations contained in paragraphs 1 through 8, of this answer with the same force and effect as if herein fully repeated.

10. DENIES the allegations contained in paragraph 30.

FOR A SECOND CAUSE OF ACTION

11. REPEATS AND REALLEGES each and all of the allegations contained in paragraphs 1 through 10 of this answer with the same force and effect as if herein fully repeated.

12. DENIES the allegations contained in paragraphs 32, 35, 36 and 37.

13. DENIES knowledge or information sufficient to form a belief as to the allegations contained in paragraph 34.

14. DENIES the allegations contained in paragraph 33, except to the extent that the provisions of the statute set forth therein speak for themselves.

FOR A THIRD CAUSE OF ACTION

15. REPEATS AND REALLEGES each and all of the allegations contained in paragraphs 1 through 14 of this answer with the same force and effect as if herein fully repeated.

16. ADMITS the allegations contained in paragraph 42.

17. DENIES the allegations contained in paragraphs 39, 41 and 43.

18. DENIES the allegations contained in paragraph 40, except to the extent that the statutes referred to therein speak for themselves.

FOR A FOURTH CAUSE OF ACTION

19. REPEATS AND REALLEGES each and all of the allegations contained in paragraphs 1 through 18 of this answer with the same force and effect as if herein fully repeated.

A16

20. DENIES the allegations contained in paragraphs 46, 47 and 48.

21. States that the allegations contained in paragraph 45 are conclusions of law.

FOR AFFIRMATIVE DEFENSES

FOR A FIRST SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE

The complaint fails to state a claim against the Federal defendants upon which relief can be granted.

FOR A SECOND SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE

That if there is a hearing requirement on the issue of granting waivers, the Federal defendants have satisfied said requirement.

FOR A THIRD SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE

The findings of the Secretary of Health, Education and Welfare are supported by substantial evidence and are conclusive.

WHEREFORE, defendant, UNITED STATES OF AMERICA, acting through Caspar Weinberger, Bernice L. Bernstein and Alan J. Saperstein demand judgment dismissing the complaint of the plaintiff herein, together with the costs and disbursements of this action.

JAMES M. SULLIVAN, JR.
United States Attorney
Northern District of New York
U.S. Post Office & Court House
Syracuse, New York 13201

BY:_____
GUSTAVE J. DiBIANCO
Assistant U.S. Attorney

A1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MABEL M. CASE, d/b/a CASE NURSING HOME, and LOUISE UNGARO, d/b/a PHILLIPS NURSING HOME,

Plaintiffs,

- against -

CASPAR WEINBERGER, as Secretary of the United States Department of Health Education & Welfare; BERNICE L. BERNSTEIN, as Regional Director for Region II of the United States Department of Health, Education & Welfare; ALAN J. SAPERSTEIN, Director, Office of Long Term Care, Region II, HEW; ABE LAVINE, Commissioner of the New York State Department of Social Services; and JOHN LASCARIS, Commissioner of the Onondaga County Department of Social Services,

Defendants.

ANSWER

75-CV-184

Defendant, Abe Lavine, by his attorney, Louis J. Lefkowitz, Attorney General of the State of New York, answering the complaint herein:

FIRST: Admits the allegations contained in paragraphs numbered "3", "4", "5", "6", "7", "10", "12", "13", "18", "19", "22", "23", "24", "29", "31", "38" and "44".

SECOND: Denies the allegations contained in paragraphs numbered "1", "2", "17", "20", "30", "32", "33", "34", "35", "36", "37", "39", "40", "41", "42", "43", "45", "46", "47", and "48".

THIRD: Denies information sufficient to form a belief as to the allegations contained in paragraphs numbered "11", "14", "16", "25", "26", "27" and "28".

A17a

FOURTH: Admits the allegations contained in paragraph numbered "8", except denies so much thereof as reads,

"and placement of Medicaid patients in such homes".

FIFTH: Admits the allegations contained in paragraph numbered "9", except denies so much thereof as reads, "in Onondaga County".

SIXTH: Admits the allegations of paragraph numbered "15" except so much thereof as reads, "and not received until on or about April", 1975.

SEVENTH: Denies the allegations of paragraph numbered "21", except admits so much thereof as reads, "[P]laintiff, Mabel Casa was first granted a hearing without a hearing officer, appealed", and avers that plaintiff Case stipulated to discontinue her appeal pending a new hearing, which hearing was held, but no decision rendered because of the change in federal law, Public Law 92-603, § 246, effective July 1, 1973.

FIRST DEFENSE

EIGHTH: The Court lacks jurisdiction of the subject matter of this action.

SECOND DEFENSE

NINTH: The Court lacks jurisdiction of the person of defendant Lavine.

THIRD DEFENSE

TENTH: The complaint fails to state a claim against defendant Lavine upon which relief can be granted.

WHEREFORE, defendant demands that the complaint herein be dismissed together with the costs and disbursements of this action.

A176

LOUIS J. LEFKOWITZ

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MABEL M. CASE, d/b/a CASE NURSING HOME, and LOUISE UNGARO, d/b/a PHILLIPS NURSING HOME,

Plaintiffs

vs.

CASPAR WEINBERGER, as Secretary of the United States Department of Health Education & Welfare; BERNICE L. BERNSTEIN, as Regional Director for Region II of the United States Department of Health Education & Welfare; ALAN J. SAPERSTEIN, Director, Office of Long Term Care, Region II, HEW; ABE LAVINE, Commissioner of the New York State Department of Social Services; and JOHN LASCARIS, Commissioner of the Onondaga County Department of Social Services,

Defendants.

75-CV-184

5/12/75

EDMUND PORT, Judge

JUDGMENT AND ORDER

The court having dictated its decision, including its findings of fact and conclusions of law on the record and the court having jurisdiction of the parties and the subject matter hereof, it is

ORDERED, that the defendant Secretary, Weinberger be and he hereby is directed, upon written request served upon him by a plaintiff herein within 30 days from the date of the entry of

A18

this Judgment and Order, to grant a hearing to said plaintiff within 90 days thereafter with respect to questions of compliance with the Life Safety Code of the National Fire Protection Association or of waiverability of noncompliance with specific provisions. Said hearing and the proceedings in relation thereto shall be in conformity with the provisions of 42 U.S.C. § 405(b) as far as practicable; and it is further

ORDERED, that all other relief demanded in the plaintiffs' complaint be and the same hereby is denied without costs; and it is further

ORDERED, that the motion for the convention of a three-judge court be and the same hereby is denied; and it is further

ORDERED, that the stay heretofore granted herein be continued for a period of 10 days from the entry of this Judgment and Order for the purpose of affording the parties an opportunity to apply for such further and different relief to the Court of Appeals as they may deem appropriate; and it is further

ORDERED, that, in the event the defendant Secretary files a notice of appeal from this Judgment and Order, the 90-day period provided for in the first ordering paragraph herein shall be tolled during the pendency of said appeal.

Edmund Port

United States District Judge

Dated: May 9, 1975
Auburn, New York

A19

THE COURT: Ms. Blum, gentlemen, as I indicated earlier in the proceedings, and for the reasons that I stated, I intend to decide this case by dictating my decision onto the record rather than writing a decision after taking it back to my chambers with me.

The reasons I think I stated and are obvious, that an undue delay would be encountered by reason of my schedule, and that is the only practical way to dispose of the matter.

I have had an opportunity to examine the pleadings, the affidavits, exhibits, transcript of the proceedings before the Secretary, stipulations that were entered into in the chamber conference, the evidence that was introduced, all the parties' memorandums of law and all of the material submitted by all the parties.

Fortunately for my digestive tract it has been fed to me over the past week, I believe, in small segments, so that I could go over it and digest it.

The decision that I will dictate will include my findings of fact and conclusions of law.

The matter started on April 28, 1975 when an order to show cause was returnable before me. The order sought the following relief. The order to show cause was initiated by the Plaintiffs. First it asked for the convening of a three judge court to enjoin the

operation of 42 USC section 1396 (a) (28) (2) as being repugnant to the Constitution. It asked for preliminary and injunctive relief requiring the defendants to afford the Plaintiffs a full administrative hearing and administrative and judicial review prior to the decertification and removal of Medicare patients from the plaintiff's nursing home facility.

Lastly, it sought a review of the action of the secretary under the Administrative Procedure Act.

It sought and was granted temporary injunctive relief pending the hearing and determination of the case, restraining the defendants from removing Medicaid patients from the Case Nursing Home or the Phillips Nursing Home, and it further restrained the defendants from discontinuing reimbursement to those facilities or otherwise changing the status of the Medicaid patients.

Now I misspoke myself, all the relief that I just listed was sought by the plaintiffs. The temporary relief granted was not quite as broad, it limited the defendants by removing Medicaid patients and from discontinuing reimbursement, the order saying nothing about the status quo of the Medicaid patients, I regarded that as something beyond either the ability or the jurisdiction of the Court to order.

The parties by stipulation deferred the motion to convene the three judge court pending the hearing to be conducted by the single judge on the matter that the parties agreed could be heard by me and were heard by me this morning and this afternoon. In the complaint the plaintiff's ascerted jurisdiction under Federal question jurisdiction, 28 USC section 1331, under the review provisions of Chapter 7 of the Social Security Act, 42 USC section 405 and 42 USC section 1395 (2) (f) (c), and pursuant to the provisions of the Administrative Procedure Act. It also alleged Declaratory Judgment Act and the three judge court act.

In their brief but not in their complaint they ascerted 28 USC 1361, mandamus as a jurisdictional base.

For the purposes of this case I will treat that claim as though it were an allegation in the complaint. Practically I don't think it makes any difference, I think I can take cognizance of any jurisdictional base.

The Plaintiff's case and Phillips are owners and operators of skilled nursing home facilities in the city of Syracuse, New York. Hereafter they will be referred to singly and jointly as plaintiff or

plaintiffs. The defendant Weinburger is Secretary of the Department of Health, Education and Welfare. The defendants Bernstein and Saperstein are Region 2 Health, Education and Welfare officials. Those defendants may be referred to as Federal defendants. They are charged with the responsibility, among other things of the administration of HEW's programs in Region 2 of which this is a part concerning skilled nursing facilities.

Defendant Lavin is Commissioner of New York State Department of Social Services and may be referred to as the State defendant.

Defendant Lascaris is Commissioner of the Department of Social Welfare of Onondaga County and may be referred to as the County defendant.

Plaintiffs as operators of the Case and Phillips Nursing Home have been providers of services as skilled nursing facilities in the Medicaid program and have received State and Federal reimbursement, pursuant to that program.

The overwhelming number of patients in their nursing homes are recipients of Medicaid benefits. Eighteen to 21 beds in the Case home are used by Medicaid patients. 20 out of 26 at the Phillips home are used for Medicaid patients.

The plaintiffs contend that they will be unable to continue in business without the Medicaid patients.

The Social Security Act requires that a skilled nursing facility comply with the Life Safety Code of the National Fire Protection Association in order to qualify as a Medicaid provider.

The Act states, however, that the Secretary of HEW may waive the provisions of the code which if rigidly applied would result in unreasonable hardship upon nursing homes, provided that granting of such waivers were -- would not adversely affect the health and safety of the patients.

Prior to July 1, 1973 the authority to issue waivers of violations of the Life Safety Code resided in State authorities. Both plaintiffs were members of the plaintiff class in Maxwell against Wyman which was a case over which I had original jurisdiction, and a reversal in part and affirmance in part, and subsequently a supplement was reported as Maxwell against Wyman, 458 F (2d) 1146, and supplemented by 478 F (2d) 1326.

As members of that class the plaintiffs at that time had been denied waivers by the State agency without hearings.

Pursuant to the rulings in Maxwell, the plaintiffs

were granted hearings which resulted in a denial of waivers. On appeal to the Appellate Division, Phillips was remanded for further evidence on the question of whether the corrected -- suggested corrections had in fact been made.

The original determination before me was in the latter part of 1971. At that time I denied what was construed by the Court of Appeals as a preliminary injunction. As I recall it, I did not find that the plaintiffs did not have a reasonable probability of success, I did find, however, that they failed to demonstrate irreparable injury, and I was reversed in that respect.

To get back to Phillips, after the case was remanded for further hearings, those hearings never occured because of the change of the law on July 1, 1973 transferring the authority to grant waivers, or I shouldn't say transferring, the placing of authority to grant waivers in the hands of the Secretary rather than having it as part of the required plan for State submission to gain approval of their plan for Medicaid reimbursement.

As I have indicated, the hearing in Phillips never took place, and the order of the Appellate Division was vacated by the Appellate Division in view

of the change in the law effective July 1, 1973.

The Case Home was denied hearings, or denied waivers, rather, after a hearing which Case alleged to be defective because for various reasons among others, the fact that there was no hearing officer present and there was no sworn testimony.

In lieu of litigating the validity of the hearing, the parties stipulated that a hearing de novo be held. Because the hearing was held shortly before July 1, 1973 and no decision had been rendered prior to the amendmant of which I spoke, the matter has never been decided.

There were various motions made before me in the Maxwell case with reference to the judgments that were entered, and among them was an order dated May 3, 1974 in which I continued the injunctive relief which had been granted pursuant to the opinions of the Court of Appeals to which I have averred until, and this is a quote from the order, that is, I continued it insofar as persons situated such as the plaintiffs in this action were that had matters pending before the Courts -- well, I didn't actually continue it, I have to withdraw that, it was phrased in the negative, the injunctive relief continued by its own order, I terminated it automatically upon an initial determination

by the Secretary pursuant to 42 USC section 1395 (j) 13. That is, as you know, the Medicaid section that was incorporated into the Medicare Act with reference to the waiver, if I am not mistaken. Consequently, the decertification of the plaintiffs nursing homes constituted the termination of the Maxwell injunction.

Up to that time from sometime in 1971, toward the end of 1971 until the secretary's determinations that are under attack here, these nursing homes were operating by virtue by the injunctive relief granted on the appeals in Maxwell against Wyman.

In October and November 1974 the plaintiffs were advised that the long term care office of HEW had recommended that the plaintiff's facilities be denied waivers of Life Safety Code violations which are alleged to have existed.

The Plaintiffs were also advised that they could request a review of this recommendation before the Program Director's Office of long term care.

In December, 1974 both plaintiffs with counsel attended such a review in New York City. The transcript of that proceeding is before the Court. Plaintiff's counsel was present and was permitted to present testimony. The testimony of the Fire Safety Consultant and James P. Regan was received.

In addition, the plaintiff was offered the opportunity to question Federal and State officials present. None of the questioning or testimony was under oath.

Both during and subsequent to the review, Plaintiffs were permitted to submit plans for bringing the facilities more closely into compliance with the Life Safety Code.

In March and April 1973 the plaintiffs were notified by the defendants Saperstein that their request for waivers were denied and the Medicaid patients would be removed.

Prior to issuing --

MR. DiBIANCO: That was 1975, Your Honor.

THE COURT: Yes, March 25 and April 8, 1975.

Prior to issuing its letter denying the waivers, the defendant Saperstein had neither listened to the tape recordings of the proceedings of December 1974 nor had the tapes then been transcribed. He had reviewed the substance of the proceedings with Morton C. Burkowitz, his assistant staff officer of Long Term Care Standards and Enforcement, who was the presiding officer at the New York City proceedings in December, 1974.

In that proceeding, and in the transcript of that proceeding, it appears that Mr. Burkowitz identified himself on the record as "Staff Officer of Long Term Care and Presiding Officer."

The letter giving the plaintiff's notice of the review stated that the regional long term care director would preside.

Although all the parties at the proceeding identified themselves on the record, no objection was made to the fact that Mr. Saperstein, the Director, was not present.

As a result of the Federal action, the local official had been instructed, that was first the State and then the County Officials were instructed to and have advised the plaintiffs that Medicaid patients should be removed from their facilities on May 12, 1975 in Case, and May 30, 1975 in Phillips on the basis of the refusal to grant waivers and finding of disqualification.

The plaintiff's main thrust is their contention that they had been denied the due process in the matter of denial of waivers to which they are entitled. They contend, although they were advised of the recommendation that waivers not be granted, and were given an opportunity to present evidence justifying

the grant of such waivers, that the review afforded by HEW did not meet the requirement of due process.

They further contend that they are denied equal protection because a skilled nursing home facility under the Medicaid Program is afforded by statute the right to certain hearings and review procedures upon disagreement with an administrative determination, while as to Medicaid provisions, the law is silent as to hearings and subsequent reviews of adverse administrative findings with reference to the grant of fire code waivers.

Reversing the position, the plaintiffs contend that the Medicare provisions for review apply to and are incorporated in the Medicaid provisions, and consequently they have been deprived of the hearings and reviews given them by Congressional mandate.

Then plaintiffs make the additional contention that the defendants actions should be set aside under the Administrative Procedure Act.

The Federal defendants take the position that no pretermination of waiver ability hearing is required, and if any due process attaches prior to the determination of non-waiverability, it in fact has been afforded the plaintiffs.

The State and County defendants assert that they

are without power or authority to determine waiverability and that their obligation if they hope to receive funds under the Medicaid provisions is to comply with the rulings of HEW.

In the briefs and in the oral arguments very little has been said about the three judge court demand. It is my guess that that is by design. I say that because with the little that has been supplied to the court, and I must say in view of the consternation expressed by the Federal Defendants, I recognize that their brief did address themselves to that question specifically, I think that there is little that can be said to compel the convention of such a court.

The three judge statute is a statute that is strictly construed. It is confined to its obvious purpose of applying only in situations where an act of Congress itself, as distinguished from the regulations administering it, or the manner of its administration is the subject of attack, and in addition, of course, the statute must be enjoined.

I note that and I regard it as significant as well that the prayer for relief in the complaint does not seek to declare the statute itself unconstitutional, but seeks to restrain the defendant from denying waivers, from removing patients, and from ceasing to

make reimbursement without a prior "full and adversary administrative hearing and -- with administrative and judicial review thereof."

A fair reading of the complaint as a whole compelled me to include that the real objections of the plaintiff is failure of the Secretary to issue regulations or to govern his conduct so as to provide for an adversary hearing prior to the denial of waivers which result in the plaintiff ineligibility as a Medicare provider.

The section that is alleged in the show cause order to be repugnant to the Constitution appears to be rather innocuous, section 1396 a 28 of Title 42, which in fact does little more incorporate -- little more than incorporate section 1395 (j) 13, and thus includes compliance with the Life Safety Code as a qualifying condition of a skilled nursing facility subject to getting the secretary in his discretion to grant waivers under specified conditions.

This appears to be an attack on the omission in the statute to delineate the procedural machinery for the exercise of this discretionary authority. It does not appear to me to be an attack on the act of Congress per se.

I think this case clearly falls within the holding

of Mills against Richardson 464 F (2d) 995, which was also a case that originated in this court.

In short, I think that the attack is on the regulatory deficiencies rather than the statutory Constitutional infirmaries.

Congress is not obliged to duplicate the Medicaid provisions or regulations in the Medicaid Act. If Congress saw fit it could spell out the hearing procedures under one act and leave the hearing procedures unstated under the other.

Additionally, although the programs both started with "Medic," Medicare and Medicaid, I think the problem that they are attacking in large part are different types.

Medicare patients are substantially beneficiaries of a group insurance policy with limited rights. Now I recognize that is a gross oversimplification in view of the ramifications of the Medicare Act, but it is distinguishable from Medicaid.

Medicare I know from the cases that I have reviewed limits nursing home care to 100 days. The care must commence within a certain closely related period to the discharge from the hospital and must be related to the same disability for which the patient was hospilaized. It has no means test of any kind.

All social security eligibles are eligible automatically for not the nursing home care, but for some parts of Medicaid. The nursing home care comes under Part B of Medicare, which is an insurance, the beneficiaries pay a premium for it, quarterly premium for it.

Medicaid patients on the other hand are not confined in age, although there is testimony that by far the great majority are elderly people, they must qualify by a means test and their stays are limited only by their continued meeting the qualifications without any specific time limitation.

There are a great many other distinctions, and I would only cite them to show that Congress was dealing with two different pieces of legislation, in fact some of it, I would say practically all of the review remedies in Medicare had their genesis before the Secretary even had authority to pass on waiverability of these Fire Code Defects.

It appears from the testimony that there now is and probably has been for a considerable period of time a shortage of skilled nursing home beds measured against the demand for them from all sources; that the persons in need of these beds accumulate rapidly. It appears from the testimony for -- of the witness Maida that as of April 15, 1975, examination of the records

in the Commissioner of Onondaga County's Office, I believe, with all of the 88 cases that are awaiting admission to skilled nursing home beds were now in their own homes and have accumulated between the first of the year and the date of the survey. The 64 that had been referred from hospitals, with one exception that occured, that has apparently been waiting since November 1974, the great bulk were referred in March and April of this year. Those in the State institutions, I don't believe he gave us those figures.

On the other hand, according to a phone survey of the defendant Lavine the facilities available as of May 6 in Onondaga County and either the contiguous or close by county -- counties, Broome, Cortland, Oneida, Madison, Oswego and Wayne had 32 skilled nursing home beds available and 28 health related beds, so that apparently the demand for skilled nursing beds outstrips the availability, but compared to the figures that were presented in the Maxwell case, it is apparent to me that overall there are more beds available than there were at that time.

The 88 patients who are awaiting entry into the skilled nursing homes from their own homes are having the services of a skilled nursing home duplicated as far as is possible in the home environment. Those in

A25

the hospital, according to the evidence, are in a higher grade facility, more costly facility, but remain there if their medical need is demonstrated until such time as skilled nursing homes beds are available. That the beds fill up appears without question. Up to this time, at least, beds in Onondaga County fill up as fast as they are vacated.

Nobody has informed us of any new construction, except that Loretta Rest opened a new facility in Onondaga County and made 88 beds available this year for Medicaid patients.

In the event that patients are removed from the nursing home facility because of decertification, it is required that the authorities provide facilities at least of a comparable nature.

While there has been no testimony that can be credited, because I don't feel that the witness that gave the testimony about the consequences of removal to elderly people from one location to another was qualified to render an opinion, nevertheless I think that the court can take judicial notice of the fact that in some instances a person could be in such physical and mental condition, or of such age as to make it inadvisable under almost any circumstances to move that person. In such instances, of course, that

would be a medical decision that would be a weighty one for the doctor in charge to make, just as they are called on everyday to decide whether a person should or should not undergo hazardous operative procedures, and if such a case should occur, I think there is no question in my mind that regardless upon whom the cost might fall, that that determination would be respected.

It appears that in the past and up to the present Onondaga County has been obliged to place some of their Medicaid qualified patients in skilled nursing home facilities outside of Onondaga County, and in fact there are 206 such placements at the present time. Every effort is made to locate qualified facilities as near the patient's home as possible, but in some instances encountered by the Onondaga Welfare Department it has been necessary, or at least I would assume advisable to place patients in Monroe, Jefferson and Westchester County.

Of course Jefferson County would be about 70 miles from Syracuse; Monroe County about 80, would be my guess, and Westchester perhaps close to 200, or perhaps in excess of 200.

It appears that although there is a scarcity of skilled nursing facilities available in Onondaga County,

there are substantial numbers of vacancies in Health Care related facilities. There has later -- there has also been testimony which I credit that some health care related facilities could be converted or qualified as skilled nursing care facilities.

The fact that at the present time consideration is being given to upgrading some part of the whole of Loretta Rest, a large geriatric institution in Syracuse, from a health related to a skilled nursing home facility.

One of the factors that surprisingly, well, I shouldn't say surprisingly, I think it is natural, was litigated here was the pocketbook element. Naturally I think the plaintiffs are concerned with their financial welfare. No one has indicated whether there is a difference in the rates for Medicaid patients or difference in the rates for skilled nursing home facility beds than health related care beds, but in any event I can understand the plaintiff's concern for their financial welfare at the present time, their facilities are well occupied by Medicaid patients, and if those patients should be lost, there conceivably would be and quite obviously the plaintiffs feel there would be, there would be a financial loss suffered by them.

The defendant Lascaris has problems of having as much help as he can from other sources, state and federal sources, to administer this program which ultimately falls on his shoulders, so that he very frankly tells us that his concern for obtaining Medicaid assistance from the Federal and State Governments, and very frankly indicates that this interest, while naturally interested in the welfare of the patients, that his interest converges to some extent at least with the plaintiff.

The State, of course, puts themselves as the innocent bystander, caught in the middle. They are obliged to comply with the law if they want to participate. They are told to -- they are told what to do and they don't have a voice in the decision making, although that isn't quite correct, because these recommendations flow up from the local level. Of course the State has remedies as against HEW if the reimbursement to which they are entitled is withheld.

The Federal defendants here of course have little monetary interest because those patients as long as they are qualified as Medicaid patients are going to be supplied with Medicaid services, and as long as they are, the Federal Government is going to be required to contribute under the Medicaid program.

Reference has been made to the interest that concerns me most, and that is the interest of the patient, and it seems that it doesn't make too much difference except for the undesirability of movement to the patient, who pays for his Medicaid. That of course is just preliminary to the question of due process.

First I must see does the plaintiff have rights that are protected by due process. They claim that they are, and that that due process is due them and requires a full adversary hearing prior to the discontinuance of Medicaid funds and prior to the removal of patients from their homes.

Their claim is very much like the Goldberg and Kelly claims, that they have a right to continue payment of benefits pending a determination of eligibility. They are saying that the defendants are depriving them of property when Medicaid patients' income is taken away from them, and that with the loss of this income they will be obliged to fold their businesses.

They go further and claim a loss of liberty in that a determination of non-compliance with the Fire Safety Code will result in their being stigmitized in some fashion.

In view of the at least present need for nursing home facilities, it is difficult to me to conceive

A40

of that as a lasting or irreparable injury of any kind. I think that sort of argument is answered by how much attention is paid to yesterday's newspaper.

Now what right do the plaintiffs have?

Well, in the first instance the rights arise from their contract with local authorities, and pursuant to the acts of Congress and regulations and standards of the Secretary, termination of the nursing home if it doesn't meet the standards, meet the requirements to qualify and that is a factual determination to which the fundamental requirements of due process are applicable.

Plaintiffs certainly have a right to the protection of their right under the statute to have a determination of the validity of any finding by the Secretary that the Fire Safety Code may not be waived under the circumstances. Due process, I think, attaches to that kind of a determination. I do not think, however, that it requires a pre-termination hearing of any kind. To me the qualification that is made at an initial determination, that is, made by the Secretary, is the same as the initial determination that is made by the Secretary as to the eligibility of all other persons who are benefitting under the Act. The person applies for disability. The Secretary makes a determination.

That determination is protected by due process review, but the man is not, does not receive the disability benefits while the review is under consideration, nor does the recipient or the applicant, rather, for social security benefits. I applied for social security benefits. The Secretary decides that I haven't reached the age of retirement. My proof of age is insufficient. I don't get social security while I am contesting his determination, and it seems to me that this is the same kind of determination. This is the first time that the secretary has had an opportunity to pass on this. Up until the time that he passes on this question of eligibility, these plaintiffs were only receiving money by reason of the court orders.

Now of course, due process, the whole business of due process is a balancing proposition. What are we balancing? Well, the harm that may come to the patient by requiring continued occupancy in structures found to be sub-standard by the Secretary, together with the public interest in protecting the health and safety of these patients must be balanced against the right of the plaintiffs to continue payments-to continued payments while the administrative and judicial hearings go on. Those are the balances, health and safety against a patient who is concededly ill and in need of

some kind of health care against the financial welfare of the plaintiff.

I took particular notice of the most recent affidavit on the question of balancing that was submitted by the plaintiff's expert, and I don't think there is any quarrel with it. He says, nobody disputes it, I don't think anybody had an opportunity to start with, it was served this morning, but in any event I have accepted it as factual. He says there has never been such an occurance in a sprinklered nursing home according to NSPA statistics. Now what he was rererring to was multiple deaths. Now that is a pretty horrible spectacle. I don't know whether you can infer, nor do I intend to infer from that statement that the statistics if examined more closely with -- would show that there have been single deaths, but what troubles me is do we have to wait for that before it goes in the balancing mix? Do we have to wait to have the horse stolen before we lock the barn? Or has Congress imposed on the Secretary, as they have a right to do, that if Federal funds are to be used they can only be used under these circumstances and in this type for -- of institution.

I think that preventing here the potential for such harm, just the potential, weighs heavily on the

scales against the dollars in the tills of nursing homes in the balancing process.

It is for that reason, or balancing these interests, that I feel that the due process that there is due is not a pre-termination due process. However, I don't think the Secretary can be faulted for affording some kind of an opportunity to change the recommendation adverse to the nursing home proprietor, and that is apparently what he has done. And I would find even if on a balancing, recognizing that balancing is difficult to make wholly objective, that even on a balancing, if pre-termination due process was due, the kind that was afforded would be sufficient under the circumstances.

Due process is a balancing first as to whether it exists, and, second, what the degree is.

In this case the plaintiffs were advised of the basis upon which the waivers were denied, of the particulars in which the premises failed to comply with the code, the proposed reconstruction and proposed remedies were considered, and it was found that in spite of the proposed remedies the buildings would still lack conformity with the Fire Safety Standards in specified respects. Because of these defects, the Secretary has found that they cannot make the ascertion that the

waiver of these defects will not adversely affect the health and safety of the patients.

And the Secretary, of course, was a party to the Maxwell case. He knows how long this has dragged around, and I think that if he put that in his mix, it would not be inappropriate.

I don't think that we can lose sight that the intent and purpose of Medicaid and Medicare is to benefit and provide for the individual recipients, the institutional providers, and their rights rise incidental to that main purpose of the Act.

Plaintiff's homes have been determined not to comply with the standards for fire safety that have been fixed by Congress.

The Secretary's decision was of-- was not reached in a hurried fashion, nor, does it appear to have been arrived at capriciously. The plaintiffs were given notice of their alleged violations of the Life Safety Code, in fact, hearings were held within the State. When the State held hearings, whether they were defective or not, certain deficiencies were brought to the attention of the plaintiffs. They were given an opportunity and they did submit plans for the construction changes to bring the homes more in compliance with the code.

A45

The Secretary provided a review, and we have had much discussion about what the reviewing should be called and the adversity of it. I am sure the Secretary has counsel of his own, but I think he would be well advised to either listen to a tape or read a transcript before he affixes his name to a termination, even though he treats the determination as a departmantal determination.

Plaintiffs and their counsel, or at least counsel were present, so were the plaintiffs and the superintendents of the respective homes, at the hearings. They were given an opportunity to prevent to -- to present testimony, to submit plans,to question officials present. They were permitted to submit drawings of proposed changes subsequent to the review, and they did that.

Recommendations of the State agency, correspondence between the Secretary and the Plaintiffs, subject matter of the review and the all plans submitted by the plaintiffs and other documents submitted together with the review that Mr. Burkowitz made formed the basis of the Secretary's decicision of non-waiverability.

The method employed by the Secretary was not arbitrary nor was the decision arbitrary or capricious.

While I have treated the Secretary's determination

here as an initial determination, nevertheless, because the Secretary has indicated that it is a final determination, I have examined it under the criteria of the Administrative Procedure Act in the event that an Appellate Court should agree with the Secretary that it is a final determination subject to review under the Administrative Procedure Act.

Assuming it to be subject to that Act, I find that the decision is supported by substantial evidence, that it is not arbitrary nor capricious and not in violation of plaintiff's Constitutional rights. In my view the interest to be protected here by due process would be met by a post-termination of the providers agreement. That is the same type of procedure that applies to a denial of a grant under other aspects, the initial denial of a grant under other aspects of the social security law which applies here, and that would be sufficient to have due process. In other words, it seems to me that we can adequately protect all of the interests involved by conducting these hearings after a determination and without risking the health or safety of a patient by contributing to their stay in structures found to be substandard.

In summary, I find that the Constitution would

require post-termination due process, but not pre-termination due process.

As to the post-termination due process, I think plaintiffs are entitled to a full adversary hearing. Those hearings should be conducted with all deliberate speed, but they are not to interfere with either the removal of Medicaid patients from the plaintiff's facilities or a termination of benefits merely by reason of this being ordered.

I think it is clear from what I have already said that I do not find the loss of income, if any, during the hearings, because the plaintiffs were irreparably injured. In fact, other than the self-serving statement of the plaintiffs that they will be forced out of business, the other facts indicate that with the shortage of nursing home beds, and that the shortage is not limited to demand solely by Medicaid patients or Medicare patients, for that matter, that they would suffer no loss. If the facilities would qualify as health related facilities, the loss of course would be reduced further, and perhaps by filling tne presently filling the unoccupied beds with patients who require less demanding and less skilled care, maybe there would be none at all.

In any event, as I indicated in the first Maxwell

case, and I think the facts are wholly different here, if the plaintiff's contentions that they are entitled to waivers are upheld after prompt hearings, their loss if any should be minimized. If the non-waiverability of the Secretary's decision is upheld, then of course they have suffered no loss, because they then have facilities that at no time met the qualifications for a skilled nursing facility.

Now if I stated that awkwardly, I will restate it. If the Secretary's decision is found to be in error and the homes are qualified, if the plaintiff's hearings are conducted with dispatch, their loss during that short period will not be irreparable by any stretch of the imagination.

If the Secretary's determination is upheld, then of course no Medicaid patient should have been permitted to occupy that bed and they have lost nothing.

Of course at all times they can compete in the marketplace for private patients.

Now since no regulations have been pointed out to me nor am I aware of the governing post-termination hearings concerning waivers, the Court will have to fashion hearings to be conducted. In that respect I think we can refer to hearing procedures with which probably all the parties have had experience. I refer

to the hearing procedures that are set forth under the Medicare statute or incorporated in the Medicare statutes, and in fact they are the same hearing procedures that control the social security hearings generally.

The post-termination hearing with respect to questions of compliance with the Life Safety Code of the National Fire Protection Association, or of waiverability of non-compliance with its specific provisions, shall be in conformity with 42 USC section 405 (b) as far as practicable. Those are the review sections, the Administrative Review Sections under the Social Security Act generally.

Of course I can't incorporate 405 (g) which gives the district jurisdiction to review those administrative hearings, that is for Congress.

I don't think it is necessary for me to express any opinion as to what if any judicial review is available from that final determination.

For the reasons I have stated here, it is ordered that a judgment be entered ordering upon written request served upon the Secretary within 30 days from the date of entry of this order, the defendant's Secretary shall grant a hearing to said plaintiffs with respect to questions of compliance and -- with the Life Safety Code of the National Fire Protection

A50

Association, or the waiverability of non-compliance of specific provisions. Said hearings and procedures in relation shall be in conformity with the provisions of 42 USC section 405 (b) as far as practicable. It is ordered that all other relief demanded in plaintiff's complaint be in the same and hereby is denied without costs, and it is further ordered that the motion for the convention of a three judge court be in the same hereby is denied. It is further ordered that the stay heretofore granted be continued for a period of 10 days from the entry of this order in order to afford an opportunity to all parties to apply for such stays as they -- to apply to the Court of Appeals for such stay as they deem appropriate.

Now gentlemen and Mrs. Blum, rather than get involved in trying to have all of the counsel agree on the form of an order, I will dictate an order the first change I get tomorrow. I have a couple of proceedings coming on tomorrow, but I know I can do it sometime tomorrow. I will file it with the Clerk and you can consider that an order will be entered tomorrow to the same effect as I have dictated on the record.

MR. LA PARO: If it please the Court, I would like to move at this time that the order, that the time for Onondaga County to comply with the mandate of the state

which in the case of Case Nursing Home is Monday, May 12, for the removal of those patients, be extended by 30 days.

THE COURT: I have stayed all that pending this hearing and determination, haven't I?

MR. LA PARO: The only stay I heard was the 10 day stay.

THE COURT: Maybe I didn't, no I continued the stay that I heretofore granted for an additional ten days from the date of the entry of this order to give you an opportunity to go to the Court of Appeals for any further stays that are necessary.

I imagine all of you can get in the car and go down together, you probably all want stays.

MR. LA PARO: Yes, Your Honor, but my point is this, assuming that no stays are granted by any Appellate Court, then we are in default in complying with the State mandate to remove the patients from the nursing home due to the fact that we ceased our efforts to remove them because of the stay that is already in effect.

In other words, we must recommence our local procedure of locating alternate places for these people and complying with the State regulations.

THE COURT: Let me see, does anybody have a copy

of the stay I granted?

(Document handed to Court.)

THE COURT: All right, now our problem is what? This stays removal of Medicaid patients for ten days from tomorrow. Now under this procedure between the State and the local commissioner, county commissioner, you are given what, 30 days?

MR. LA PARO: Yes, Your Honor. There was one 30 day period in the Case Nursing Home which will expire on Monday the 12th, but the 30 days, during the 30 day period we are required as was stated in the testimony here today, to acquaint the patients with alternate facilities, have conferences with his family and try to have conferences with him and adjust him to that move. Now due to the fact that there was a stay and we have ceased our efforts for a period of 11 days, that is, from April 28 until today, what alternate facilities might have been possible or what conferences we may have had, I don't know if we had them with all patients in all cases, are no longer viable because if there were any beds available those have been taken up.

THE COURT: So what happens if you don't -- right now the order disqualifying or denying waivers has been stayed, I think this order probably -- I think maybe

this would resolve the problem for everybody. If the dates for the April -- what is it, May 12 and May 30 dates were extended to what?

MR. LA PARO: We would like a 30 day extension.

THE COURT: And then I would have to apply that same injunctive relief to the Federal defendant as well.

MR. LA PARO: We could have them extend it to June 12 and June 13.

THE COURT: Of course what you are doing is getting me in the middle of a hassle of who is going to pay.

MR. LA PARO: Not really, that is not true, what we would be content with is --

THE COURT: If you don't get them out, then what is the effect? Can't you people agree on it for this short period? Now I bet if you get down to the Court of Appeals you will agree.

MR. DUFUR: It seems to me the ten day period is a continuation of your earlier stay, so it is really academic at this point, it depends on what happens. If somebody goes to the Court of Appeals, if they should grant a further stay --

THE COURT: That was my purpose in sending you there, you can all go down there and make your representations and have some judge decide how long he wants to keep this thing going, if he wants to keep it going

at all. As far as I am concerned, I have decided that there is no need to keep it going at all, but I want you to have an opportunity to make these representations to the Court of Appeals, and you can all go down and express your viewpoint. Do you have something to contribute --

MR. HINESBURG: I do, Your Honor. You have ordered that hearings would be held with all speed, hold and administrative hearing by a notice by the plaintiffs within 30 days after entry. In the normal procedure under the social security administrative law judge in the Northern District of New York, or Administrative Law Judge anyplace, we have been experiencing a considerable delay between the time of asking for a hearing and of the time that the hearing can be granted, and I am wondering if you can set a time limit which the hearing has to be conducted in.

THE COURT: There is one other thing I should do, too, I should stay -- are you familiar with the administrative procedure of setting up hearings?

MS. BLUM: Under the social security act?

THE COURT: Yes.

MS. BLUM: Yes.

THE COURT: Is there any reason why a hearing couldn't be scheduled within 90 days from the time that

MS. BLUM: There was -- there has been a shortage of administrative law judges and we have been experiencing delays on the hearings.

THE COURT: Of course I am aware of that, I have contributed to the delay by piling up a lot of reserve decisions in social security cases. In most instances they don't do any harm because the money is going to the administrators. But I think they could arrange for that in 90 days. I don't know if there is any provision for a preference, but I think we would give it a preference and if there is something wrong with it you can seek a further stay.

MR. LA PARO: If we could help the county to some extent, wouldn't it be possible to toll the running of the 30 day period while the stay was in effect from April 28 to May 7? During that period of time, the county couldn't do anything to effect the changing of the patients.

THE COURT: That is what I am talking about, that requires staying the Secretary's order.

MR. LA PARO: Yes, Your Honor, in other words, extent 10 days to 45 days. It is not effectively staying the order, it is excepting the time you stayed the removal from the time limit that has been set down by the Secretary.

THE COURT: But it continues the Secretary's liability?

MR. LA PARO: Yes, Your Honor.

THE COURT: I am more concerned about the patients being in [illegible] homes.

MR. LA PARO: But, Your Honor, it is only proper that the Secretary's liability be continued, because we have complied for a period.

THE COURT: I want to see these people out.

MR. LA PARO: I understand that, Your Honor, but the least that the law requires is that we be allowed 30 days in which to accomplish that. Even the Secretary recognizes that as a necessity. However, for 11 days now --

THE COURT: I am inclined to think that rather than embroil the court in a whole car of worms of administrative nature, the two administrators can get together and work out the problems. If you can't work out some of the problems like that -- it comes down to either you can get these people or you can't and who pays for them if you can't? My purpose is to enforce the Secretary's order. I think that is where the public interest lies.

MR. WINEBURG: Again there have been times when the Appeals counsel has not gotten back with a dedsion

in 30 days. There have been times when we have waited six, seven months for a decision. If we are talking about irreparable injury we could be talking about years in this process.

THE COURT: You have already engaged in two years -- let's see, 1971 to 1975, we have covered quite a distance already, so this is the first I have noticed the plaintiffs really urging speedy hearings.

I think the -- I think I will order the Secretary to have these hearings. So insofar as your problem is concerned, it is a problem of only Case really.

MR. LA PARO: It is a problem with Case more urgently than it is with Phillips, because with Phillips we haven't been robbed of as many different -- pardon me, as many days, but in Case we are stuck, but if I could without burdening the court with any further contentions, if I could in one sentence burden you, it seems only proper to me that Your Honor, if we were given 30 days by statute in order to accomplish something, and by Your Honor's own order we have been stayed for 11 days from complying with that, that we should be granted the total run of those 30 days.

THE COURT: You make great sense, I will grant you that.

MS. BLUM: Except Your Honor has granted ten days

stay, you want 11?

MR. LA PARO: No, she is mistaken.

THE COURT: I know what counsel is talking about, he is talking about tolling the --

MR. LA PARO: The 10 days stay you have granted also prevents us from doing anything with those people for ten days.

THE COURT: It doesn't prevent you from making plans.

MR. LA PARO: No, the 11 days I am talking, April 28 until today, those are the 11 days I am talking about, not the additional ten.

THE COURT: I appreciate that, so that the effect of this is that you have got --

MR. LA PARO: We were to have 11 days to do it with the exception of the 11 days Your Honor told us not to do it.

THE COURT: Is there any way I can pay you for that time? I would much prefer to do it. I suppose I could stay the secretary's order removing the patients. What exhibit is the letter to the State authorities?

(Discussion held off the record.)

MR. WINEBURG: They were attached to our order to show cause, Department of Social Services of the State to the plaintiffs.

THE COURT: No, I am going to keep the pressure on everybody.

MR. WINEBURG: I have one other thing. The other day in chambers we talked about the Henderson Nursing Home was under a similar 30 day order as Phillips. We discussed the possibility of joining them in this action, at least since the issues seemed to be the same in both and I am wondering if we could at this point ask to have them joined in just for- the ten day purpose until we get to the Court of Appeals.

THE COURT: Well, I don't know how I could do that. They are not parties. When are they due?

MR. WINEBURG: May 30, no later than May 30.

THE COURT: I don't know of any jurisdiction I have for that.

MR. WINEBURG: We had intended originally to move to add them as a party plaintiff.

THE COURT: Well, what does it mean? Assuming the facts are comparable, you have got a determination, I assume the Secretary if this determination of the post termination hearing is upheld, it isn't going to confine the hearings to Case and Phillips. Everybody is going to get them.

MR. WINEBURG: On the other hand, if the plaintiff's contention that the plaintiffs are entitled to a

pre-termination hearing is upheld in the Court of Appeals, and you are reversed, Henderson Nursing Home will be seriously damaged.

THE COURT: I suppose they could start a suit. Of course I would assume they would be in no better position than these plaintiffs, but their rights would be presumably be protected.

MR. WINEBURG: Except, Your Honor, if we start a suit tomorrow and ask by the filing of a complaint and order to show cause, by your ruling there would be no temporary injunctive relief.

THE COURT: That's right, but they are protected, if I am held to be wrong we -- they will be in the same position that Case and Phillips are in.

Certainly probably a complaint should be filed, that is, I don't want to appear to be advising, but I would suppose that it is the only thing. There has got to be something in front of me.

Is there anything else?

Now there is one other thing, is there any need for staying this judgment? Now this judgment is the judgment of dismissal. There is no need to stay that. It is a judgment denying the production of the three judge court. That doesn't lend itself to a stay, and it is a judgment ordering hearings.

Now I suppose that should be incorporated in the 10 days while the matter is going to the Court of Appeals, because otherwise the Secretary could find himself -- unless he wants to be in that position, I don't know -- but he could find himself in a position where a hearing is requested and his 90 days is running and it is appealed, it may or may not have been determined.

I think as a matter of fairness I should grant a stay as to that order and paragraph as well, and the hearings that I have ordered will be on written request within 30 days from date of this order, and the Secretary to grant a hearing within 30 days of the date of demand, and it should be under that the plaintiffs are not precluded from making a demand for the hearing on the secretary by reason of my ten day stay. So that if the plaintiffs are interested in an expeditious disposition, they can start the ball rolling right away.

And I want to thank you all for the help given me. I appreciate it. Under other circumstances you might have received a more scholarly and better supported determination, but rest assured that I have read the authorities, and in spite of the fact that part is from notes and parts from the top of my head

it was done with an understanding of the authorities you submitted.

MR. DI BIANCO: We assume you consider our motion to dismiss as moot?

THE COURT: That's right.

MR. DI BIANCO: I am sorry, the motion for summary judgment.

THE COURT: That's right.

****

This is to certify that the foregoing is a true and accurate transcript of the hearing heard at the time and place noted in the heading hereof.

MARTIN L. MILLER
Official Court Reporter
United States District Court
Northern District of New York

A63